FILE

In the

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1973

No. 73-1661

LOUIS S. KOVARS, JR.,
Petitioner,

VERSUS

THE STATE OF OKLAHOMA,
Respondent.

BRIEF OPPOSING CERTIORARI

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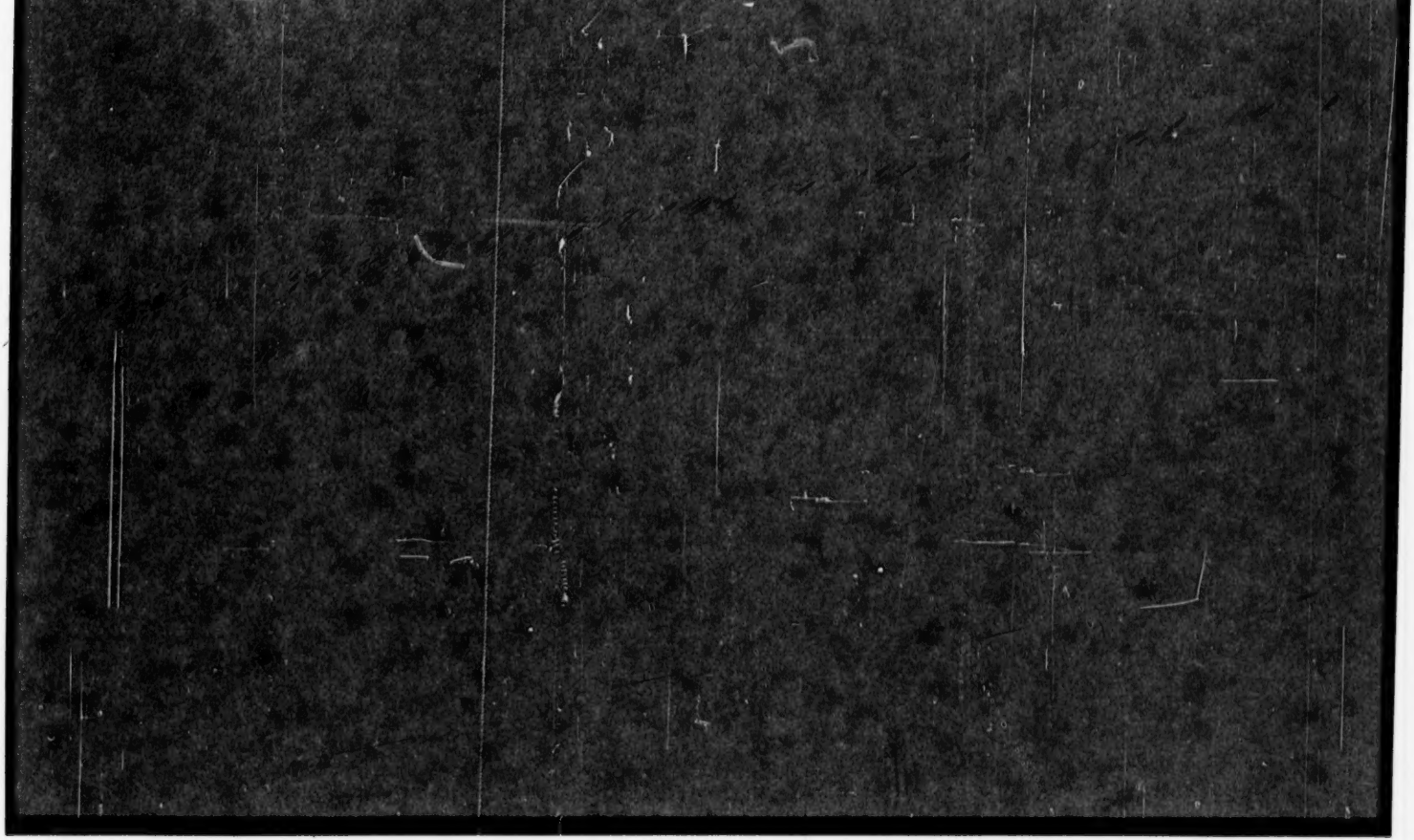

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STATEMENT OF CASE

The petitioner herein, Louis S. Kovash, Jr., was charged, tried, and convicted in the District Court of Oklahoma County, Oklahoma, for the offense of Unlawful Distribution of a Controlled Substance, Barbiturate, and was sentenced to serve a term of three (3) years in the State Penitentiary. Petitioner perfected his appeal to the Court of Criminal Appeals, State of Oklahoma, and on February 11, 1974, said Court affirmed the judgment and sentence hereinbefore entered. On February 26, 1974, petitioner filed his petition for rehearing which was denied by the Court of Criminal Appeals of the State of Oklahoma on February 28, 1974.

REASON FOR NOT GRANTING THE WRIT

Petitioner's ability to prepare his defense and prepare for trial was not unconstitutionally hampered and his right to be confronted with witnesses against him was not unconstitutionally infringed upon by the refusal of the trial court to require the State to disclose the identity of the confidential informant who was present at the time the alleged crime occurred.

ARGUMENT AND AUTHORITY

The petitioner primarily bases his argument on the theory that the instant situation is analogous to that in *Roviaro* v. *U. S.*, 353 U.S. 53, 77 S.Ct. 623, 1 L.Ed.2d 639 (1957), wherein this Honorable Court stated that:

> "Where the disclosure of an informer's identity, or of the contents of his communication, is relevant and helpful to the defense of an accused, or is essential to a fair determination of a cause, the privilege must give way."

This Court further elucidated its ruling in *Roviaro, supra,* by stating:

> "We believe that no fixed rule with respect to disclosure is justifiable. The problem is one that calls for balancing the public interest in protecting the flow of information against the individual's right to prepare his defense. Whether a proper balance renders nondisclosure erroneous must depend on the particular circumstances of each case, taking into consideration the crime charged, the possible defenses, the possible significance of the informer's testimony, and other relevant factors."

The respondent respectfully contends that the petitioner has misconstrued the holding rendered in *Roviaro, supra,* and misapplied it to the current factual situation.

Although the confidential informant was present throughout the period in which the police officer alleges petitioner committed the crime, with which he was charged, he (the informer) was merely a distant observer, he neither took part in the actual transaction nor did he participate in any preliminary activities which instigated the transaction. The crucial and significant distinction between *Roviaro, supra,* and the instant case is that in *Roviaro* the informant was an active participant in a transaction involving the illegal possession and delivery of heroin, whereas in the instant case the informer was a mere bystander, and there is no reason to believe, and indeed the defendant has not shown why, said informer's testimony would be any more helpful to him than that of any other bystander who had witnessed the transaction.

An even more fundamental distinction exists between *Roviaro, supra,* and the instant case in that it is clear from the factual situation that the transaction in *Roviaro,* would not have been consummated had it not been for the participation of the informant; whereas in the instant case there was not one scintilla of evidence to indicate that the transaction would not have been consummated had the informer been absent. All the police officers present at the transaction were subject to cross-examination, but no evidence was brought forth to indicate that the informer participated in the transaction or provided any necessary element of the crime.

Since this Honorable Court rendered its decision in *Roviaro, supra,* many federal and state courts have addressed themselves to the issue of whether the State has the privilege of concealing the identity of an informer and when said privilege must give way in the interest of justice for the defendant. In nearly all of the cases the privilege is upheld when it was shown that the informer had neither taken part in the transaction nor instigated its commencement.

In *United States* v. *Simmons,* 338 F.2d 804, *cert. den.* 85 S.Ct. 1352, 380 U.S. 983, 14 L.Ed.2d 276 (1st Cir. 1964), the Court of Appeals for the First Circuit stated that:

> "In November, 1961 Federal Bureau of Narcotics agent George Dillworth was assigned to an undercover investigation in the Connecticut area. On November 14 and 15, 1961, Dillworth, in the presence of Rayfield Johnson, an informer, purchased heroin from a person alleged to be Simmons. The incidents were under the surveillance of federal agent Doll and two Connecticut state troopers.
>
> "As for the informer, the government need not call every witness who might have something to say, especially when the sale was not made through the informer and there was additional independent evidence of the transaction. See *United States* v. *Holiday,* 319 F.2d 775 (2nd Cir. 1963); c.f. *Roviaro* v. *United States,* 353 U.S. 53, 63-64, 77 S.Ct. 623, 1 L.Ed.2d 639 (1957)."

In the case of *Whittington* v. *State of Maryland,* 262 A.2d 75 (1970), in which a factual situation existed which was almost identical to the facts herein, the Court, in upholding the privilege of anonymity, set forth the various

criteria first established in *Roviaro, supra,* which should be met before a decision is rendered regarding the privilege of nondisclosure of an informer's identity. These criteria and their applicability to the instant case will be discussed below.

1. The State has the privilege to withhold from disclosure the identity of informers. This long-standing and vital privilege was initiated to aid narcotics investigators by encouraging and protecting those individuals who are willing to come forward and aid in the investigation of illicit drug traffic. The respondent submits that the trial court, in the instant situation, determined that if the privilege were revoked and the informer's identity revealed, then the informer would no longer be of value to investigators in the community.

2. Upon demand by the defendant, the trial court may, in the exercise of judicial discretion, compel such disclosure upon determination that it is necessary and relevant to a fair defense and when proper demand is made by a defendant, the burden is upon him to establish by a preponderance of the evidence that the informer's identity is, in fact, necessary and relevant to a fair defense.

The respondent respectfully submits that in the instant case the petitioner's demand was not only untimely, but he also failed to establish by preponderance of the evidence that the informer's identity was, in fact, necessary and relevant to a fair defense. The petitioner knew well in advance of the trial date that a confidential informant existed (Tr. 24), but he did not demand the name of said informant until the time of the trial. In the case of *United*

States v. *Barnes*, 486 F.2d 776 (8th Cir. 1973), the Court stated:

> "In some cases, where disclosure might have otherwise been appropriate, the courts have held that the accused waived his right to disclosure. For example in *United States* v. *Cansler*, 419 F.2d 952 (7th Cir. 1969), cert. den. 397 U.S. 1029, 90 S.Ct. 1278, 25 L.Ed.2d 540 (1970), one of the factors relied upon by the Court to refuse disclosure was that the defendant had never demanded production of the informer prior to trial. See also *State* v. *Smart*, 448 F.2d 931 (2nd Cir. 1971), cert. den. 405 U.S. 998, 92 S.Ct. 1269, 31 L.Ed.2d 467 (1972); *United States* v. *Roberts*, 401 F.2d 538 (2nd Cir.), cert. den. 393 U.S. 1005, 89 S.Ct. 496, 21 L.Ed.2d 469 (1968); *Firo* v. *United States*, 340 F.2d 597 (5th Cir. 1965); *United States* v. *Coke*, 339 F.2d 183 (2nd Cir. 1964)."

In addition to the foregoing, the petitioner did not show how the informer's identity was necessary and relevant to a fair defense. The informer did not take part in the transaction. He was merely an observer. The respondent respectfully contends that the informer would not have been able to shed any more light on the transaction than any other observer who could have been called as a witness by the petitioner.

3. In making its determination, the Court should consider such factors as:

(a) The nature of the crime charged.

(b) The importance of the informer's identity to the issue of innocence or guilt, as for example, whether or

not the informer was an integral part of the illegal transaction.

(c) The significance of his testimony.

(d) The possible defenses.

In the instant situation the petitioner was charged with the crime of Unlawful Distribution of a Controlled Substance, Barbiturate, a crime closely associated with illicit drug traffic which in itself spawns a multitude of other crimes and infests society with its inherent evils.

The informer was not an integral part of the illegal transaction. As indicated above, there is not one scintilla of evidence to indicate that the transaction would not have occurred had the informer been absent.

There was no showing by the petitioner that the informer's testimony could shed any more light on the transaction than would the testimony of any other observer.

A traditional defense advanced in barbiturate and drug cases is entrapment, but said defense was totally inapplicable in the present situation since the informer was not a participant in the transaction.

4. Once the defendant establishes by a preponderance of the evidence that the identity of the informer is necessary and relevant to a fair defense, the burden shifts to the State which must, by clear and convincing evidence, rebut the showing by the defendant that the identity of the informer is necessary and relevant to a fair defense.

The respondent respectfully submits that since the petitioner did not establish why the informer's identity was necessary and relevant to a fair defense, that no burden shifted to the State to rebut such showing. The State did, however, point out to the trial court that the informer was merely a bystander, that demand of his identity was not timely made, and that the informer was still aiding in the investigation of illicit drug traffic in the community and that to reveal his identity would impede the investigation and perhaps even endanger his life.

CONCLUSION

The decision of whether or not to compel disclosure is discretionary with the trial court, and in each case the determination must rest on the particular circumstances inherent in that case. The respondent respectfully submits that the facts in the instant situation, as discussed above, did not compel disclosure.

THEREFORE, premises considered, it is respectfully submitted that the petition for writ of certiorari should be denied.

Respectfully submitted,

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August, 1974

CERTIFICATE OF SERVICE

This is to certify that I mailed three copies of the above and foregoing instrument to which this certification is attached, to the following named counsel of record this ..... day of ....., 1974:

Mr. Don Hamilton
800 Cravens Building
119 North Robinson
Oklahoma City, Oklahoma 73102

.....
MARVIN C. EMERSON